(6)

No. 02-980

IN THE

Supreme Court of the United States

Supreme Court, U.S.
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CORE COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS BELLSOUTH, SBC, VERIZON, AND USTA IN OPPOSITION

WILLIAM P. BARR
MICHAEL E. GLOVER
EDWARD H. SHAKIN
JOHN M. GOODMAN
VERIZON
1515 North Courthouse Road
Suite 500
Arlington, Virginia 22201
(703) 351-3860
Counsel for the Verizon telephone companies

JAMES G. HARRALSON
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Suite 1800
Atlanta, Georgia 30309
(404) 249-2641
Counsel for BellSouth Corp.

MARK L. EVANS
Counsel of Record
MICHAEL K. KELLOGG
SEAN A. LEV
AARON M. PANNER
SCOTT H. ANGSTREICH
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for BellSouth Corp., SBC Communications Inc., the Verizon telephone companies, and United States Telecom Association

[Additional Counsel Listed on Inside Cover]

March 31, 2003

32 pp

LAWRENCE E. SARJEANT
INDRA SEHDEV CHALK
MICHAEL T. MCMENAMIN
ROBIN E. TUTTLE
1401 H Street, N.W., Suite 600
Washington, D.C. 20005
(202) 326-7371
Counsel for United States Telecom Association

JAMES D. ELLIS
PAUL K. MANCINI
SBC COMMUNICATIONS INC.
175 East Houston
San Antonio, Texas 78205
(210) 351-3448

GARY L. PHILLIPS
SBC COMMUNICATIONS INC.
1401 I Street, N.W., Suite 400
Washington, D.C. 20005
(202) 326-8910
Counsel for SBC Communications Inc.

QUESTION PRESENTED

Whether the D.C. Circuit's decision to remand, but not vacate, the FCC's transitional intercarrier compensation rules is consistent with settled principles of administrative law, where the court found it likely that the FCC has authority to issue those rules under statutory provisions different from the one on which the FCC had relied, and where vacatur of the rules pending completion of the remand proceedings would reinstate a regime that the FCC found fostered regulatory arbitrage and distorted the development of competitive markets.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents BellSouth Corporation, SBC Communications Inc., the Verizon telephone companies,* and the United States Telecom Association state the following:

BellSouth Corporation has no parent company, and no publicly owned company owns 10% or more of its stock.

SBC Communications Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

The Verizon telephone companies are wholly owned subsidiaries of Verizon Communications Inc. Verizon Communications Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

The United States Telecom Association ("USTA") is the leading not-for-profit trade association for the local telephone industry. Founded more than a century ago, USTA represents some 600 facilities-based incumbent wireline providers of local telephone service, which operate more than 80% of the country's local access lines. USTA also has international and associate members that include consultants, communications equipment providers, banks and investors, and other parties with interests in the local exchange carrier industry. USTA has no parent companies, subsidiaries, or affiliates for which disclosure is required.

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* The Verizon telephone companies (formerly the affiliated local telephone companies of Bell Atlantic Corporation and GTE Corporation) consist of the following: Contel of the South, Inc. d/b/a Verizon Mid-States; GTE Midwest Incorporated d/b/a Verizon Midwest; GTE Southwest Incorporated d/b/a Verizon Southwest; The Micronesian Telecommunications Corporation; Verizon California Inc.; Verizon Delaware Inc.; Verizon Florida Inc.; Verizon Hawaii Inc.; Verizon Maryland Inc.; Verizon New England Inc.; Verizon New Jersey Inc.; Verizon New York Inc.; Verizon North Inc.; Verizon Northwest Inc.; Verizon Pennsylvania Inc.; Verizon South Inc.; Verizon Virginia Inc.; Verizon Washington, DC Inc.; Verizon West Coast Inc.; Verizon West Virginia Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENTS ii

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 10

I. THE PETITION IS PREMISED ON A FUNDAMENTAL MISUNDERSTANDING OF THE COURT OF APPEALS' DECISION 10

II. THE COURT OF APPEALS' APPLICATION OF ITS SETTLED PRECEDENT IS CORRECT AND DOES NOT MERIT REVIEW 13

III. THERE IS NO CIRCUIT CONFLICT HERE 20

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) 12

Allied-Signal, Inc. v. United States Nuclear Regulatory Comm'n, 988 F.2d 146 (D.C. Cir. 1993) 9, 14, 16, 20

Ambassador, Inc. v. United States, 325 U.S. 317 (1945) 12

American Corn Growers Ass'n v. EPA, 291 F.3d 1 (D.C. Cir. 2002) 15

Atlantic City Elec. Co. v. FERC, 295 F.3d 1 (D.C. Cir. 2002) 11

Bell Atlantic Tel. Cos. v. FCC, 206 F.3d 1 (D.C. Cir. 2000) 5

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) 12, 13

Central & South West Servs., Inc. v. EPA, 220 F.3d 683 (5th Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001) 21

Central Maine Power Co. v. FERC, 252 F.3d 34 (1st Cir. 2001) 21

Checkosky v. SEC, 23 F.3d 452 (D.C. Cir. 1994) 14

Davis County Solid Waste Management v. EPA, 101 F.3d 1395 (D.C. Cir. 1996), *modified on reh'g*, 108 F.3d 1454 (D.C. Cir. 1997) 15

Fox Television Stations, Inc. v. FCC:

280 F.3d 1027 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002) 15

293 F.3d 537 (D.C. Cir. 2002) 11

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 14

ICORE, Inc. v. FCC, 985 F.2d 1075 (D.C. Cir. 1993) 13

Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392 (9th Cir. 1995) 20

Independent U.S. Tanker Owners Comm. v. Dole, 809 F.2d 847 (D.C. Cir. 1987) 19

International Union, United Auto. Workers v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991), *order on supplemental briefing*, No. 89-1559, 1991 WL 223770 (D.C. Cir. Sept. 16, 1991) 15-16

International Union, United Mine Workers v. Federal Mine Safety & Health Admin., 920 F.2d 960 (D.C. Cir. 1990) 14, 16

Maryland People's Counsel v. FERC, 768 F.2d 450 (D.C. Cir. 1985) 19

Milk Train, Inc. v. Veneman, 310 F.3d 747 (D.C. Cir. 2002) 14

National Fed'n of Fed. Employees, Local 1309 v. Department of the Interior, 526 U.S. 86 (1999) 11

National Mining Ass'n v. EPA, No. 95-1006, 1996 WL 10101 (D.C. Cir. Jan. 16, 1996) 15

National Org. of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs, 260 F.3d 1365 (Fed. Cir. 2001) 21

Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355 (1994) 11

SEC v. Chenery Corp., 318 U.S. 80 (1943) 11

Serono Labs., Inc. v. Shalala, 158 F.3d 1313 (D.C. Cir. 1998) 16

Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002) 18

United States v. Mead Corp., 533 U.S. 218 (2001) 12, 13

United States ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252 (8th Cir. 1998) 20

USTA v. FBI, 276 F.3d 620 (D.C. Cir. 2002) 15

USTA v. FCC:

290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, No. 02-858 (U.S. Mar. 24, 2003) 18, 19

Nos. 00-1012, *et al.* (D.C. Cir. Sept. 4, 2002) 19

Nos. 00-1012, *et al.* (D.C. Cir. Dec. 23, 2002) 19

Nos. 00-1015, *et al.* (D.C. Cir. Dec. 23, 2002) 19

ADMINISTRATIVE DECISIONS

Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999), *vacated, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) 4, 5

First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *decision on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part sub nom. Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646 (2002) 3, 6

Memorandum Opinion and Order, *MTS and WATS Market Structure*, 97 F.C.C.2d 682 (1983) 4

Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 (2001) 8, 20

STATUTES AND REGULATIONS

Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* 14

Clean Air Act, § 112, 42 U.S.C. § 7412 15

Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*:

47 U.S.C. § 201 ..... 6, 8, 16

47 U.S.C. § 201(b) 12, 13

47 U.S.C. § 251(b)(5) ..... *passim*

47 U.S.C. § 251(c)(2) 2

47 U.S.C. § 251(g) 3, 6, 9, 11

47 U.S.C. § 251(i) 16

47 U.S.C. § 252(d) 18

47 U.S.C. § 252(d)(2) 2

47 U.S.C. § 252(d)(2)(A) 17

47 U.S.C. § 252(d)(2)(B)(i) 11, 16

47 U.S.C. § 253(a) 2

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 1

§ 202(h), 110 Stat. 111-12 18

47 C.F.R. § 51.701(b)(1) (1996) 2

47 C.F.R. § 51.703(a) (1996) 2

OTHER MATERIALS

CompTel Press Release, *CompTel Views FCC Reciprocal Compensation Decision as a Victory for Competition and Consumers* (Apr. 19, 2001), *at* http://www.comptel.org/press/apr19_2001.html 8

Statement of John Windhausen, Jr., ALTS (Apr. 19, 2001), *at* http://www.alts.org/NewsPress/041901 RecipComp.PDF 8-9

PRELIMINARY STATEMENT

In accordance with its established, widely accepted precedents, the D.C. Circuit concluded that it should remand, but not vacate, an order of the Federal Communications Commission ("FCC") adopting new transitional rules to govern the compensation that one local exchange carrier ("LEC") must pay to another when they exchange calls bound for the Internet. Petitioner's challenge to the court's exercise of its remedial discretion rests on a false premise. According to petitioner, the D.C. Circuit's decision to remand without vacating permitted the FCC "to enforce rules that it had no statutory authority to promulgate." Pet. 8. This is so, petitioner asserts, because the D.C. Circuit held that "the FCC had no power to regulate intercarrier compensation for [Internet]-bound calls." Pet. 9. The entire petition proceeds on that starting assumption.

But in fact the D.C. Circuit held no such thing. Although it concluded that the specific statutory provision on which the FCC had relied did not support the rules at issue, the court believed it likely that the FCC could justify the rules under other statutory provisions. For that reason — and in view of the FCC's amply supported conclusion (which petitioner here makes no attempt to dispute) that the rules at issue were necessary first steps in eliminating regulatory arbitrage that had been undermining the development of competition in local telephone markets — the court determined to allow those rules to remain in place while the FCC conducts its proceedings on remand.

The court's decision is correct, and petitioner's claims of circuit and intra-circuit conflicts are meritless. The petition for a writ of certiorari should therefore be denied.

STATEMENT OF THE CASE

1. The 1996 Act. The provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act" or "Act"), at issue here were designed to open the local telephone business to real and sustainable competition. To that end, Congress preempted all state laws establishing local

telephone franchises, *see* 47 U.S.C. § 253(a), and also established rules to ensure that a competitive local exchange carrier ("CLEC"), such as petitioner Core Communications, Inc. ("CoreTel"), can "interconnect" its network with that of an incumbent local exchange carrier ("ILEC"), such as respondents BellSouth, SBC, and Verizon, *see id.* § 251(c)(2). Interconnection enables callers who subscribe to a CLEC's telephone service to receive calls from, and place calls to, individuals who subscribe to the ILEC's service.

The 1996 Act requires interconnecting local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." *Id.* § 251(b)(5).[1] The Act specifies that such arrangements may "provide for the mutual and reciprocal recovery" of costs through intercarrier payments or through "arrangements that waive mutual recovery (such as bill-and-keep arrangements)." *Id.* § 252(d)(2).[2] The FCC's initial regulations implementing § 251(b)(5) required carriers to provide compensation only for the "transport and termination of local telecommunications traffic," defined as traffic that "originates and terminates within a local service area established by the state commission." 47 C.F.R. §§ 51.701(b)(1), 51.703(a) (1996). The FCC explained that § 251(b)(5) is "intended for a situation in which two carriers collaborate to complete a local call" and "do[es] not apply to the transport or termination of interstate or intrastate interexchange traffic"; instead, compensation for "interstate access services" will continue to be governed by pre-1996 Act rules pursuant

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[1] Reciprocal compensation typically works as follows: When a customer of Carrier A calls a customer of Carrier B in the same local area, Carrier A pays Carrier B for "terminating" (or completing) that local call. Similarly, when a customer of Carrier B calls a customer of Carrier A, Carrier B pays Carrier A. Reciprocal compensation is generally computed on a minutes-of-use basis.

[2] In a "bill-and-keep" arrangement, each carrier is responsible for its own costs, recovering them from its own customers rather than from the other carrier.

to 47 U.S.C. § 251(g). *Local Competition Order*,[3] 11 FCC Rcd at 16013, ¶ 1034 (citing 47 U.S.C. § 251(g)).

2. The 1999 *ISP Declaratory Ruling*. Shortly after the FCC promulgated its initial regulations, disputes arose between ILECs and CLECs as to whether Internet-bound traffic is local traffic subject to reciprocal compensation under § 251(b)(5).[4] The issue is significant because, unlike other types of calls where the traffic exchanged flows in both directions (and where compensation for such traffic is therefore "reciprocal"), dial-up calls to the Internet are made in only one direction, from the customer initiating the call to the Internet. If these one-way calls were subject to the obligation to pay reciprocal compensation, it would allow carriers to engage in what the FCC has termed "regulatory arbitrage," by inserting themselves between the carrier that serves the customer making the call and an Internet Service Provider ("ISP"). In that scenario, calls are originated by an ILEC customer, handed off to a CLEC, and from there routed to an ISP, such as America Online, for termination to destinations on the Internet that are located across the country and around the world. Because these calls flow in one direction only, the CLEC could skim off a steady stream of payments for doing nothing other than serving as a passive conduit through which Internet-bound calls travel.

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[3] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 ("*Local Competition Order*"), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *decision on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part sub nom. Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646 (2002).

[4] The terms "Internet-bound" and "ISP-bound" are essentially interchangeable; both refer to communications that originate on a carrier's network and are delivered to an ISP for onward transmission to distant locations over the Internet.

CLECs contended that they should be able to do precisely that, on the theory that such traffic should be treated as two separate calls: one, a local call from an ILEC customer to an ISP for which reciprocal compensation is required; the other, the continuing connection provided by the ISP to distant locations on the Internet. ILECs, on the other hand, argued that Internet-bound traffic involves a continuous, non-local communication between the ILEC customer and the customer's chosen destinations on the Internet, an analysis that is consistent with the FCC's long-standing recognition that service providers such as ISPs "obtain[] local exchange services . . . for the purpose of completing interstate calls which transit its location" en route to a destination "out of state."[5] Although Internet-bound traffic would thus not be subject to reciprocal compensation, carriers that serve ISPs could recover directly from their ISP customers any costs they incur in carrying that traffic.

In 1999, the FCC issued the *ISP Declaratory Ruling*,[6] in which it agreed with the ILECs that Internet-bound traffic "do[es] not terminate at the ISP's local server, . . . but continue[s] to the ultimate destination or destinations, specifically at a[n] Internet website that is often located in another state." 14 FCC Rcd at 3697, ¶ 12. The FCC reached this conclusion based on its "traditional[]" jurisdictional analysis, under which it assesses the "nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers." *Id.* at 3695, ¶ 10. The FCC further found that, on an "end-to-end"

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[5] Memorandum Opinion and Order, *MTS and WATS Market Structure*, 97 F.C.C.2d 682, 711-12, ¶ 78 (1983).

[6] Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) ("*ISP Declaratory Ruling*"), *vacated, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

basis, "a substantial portion of Internet traffic involves accessing interstate or foreign websites." *Id.* at 3702, ¶ 18. Accordingly, the FCC concluded that Internet-bound traffic is "non-local interstate traffic" and that "the reciprocal compensation requirements of section 251(b)(5) . . . and . . . of the Commission's rules do not govern inter-carrier compensation for this traffic." *Id.* at 3706, ¶ 26 n.87.

3. The D.C. Circuit's *Bell Atlantic* Decision. CLECs filed petitions for review of the *ISP Declaratory Ruling*, challenging the FCC's conclusion that Internet-bound traffic is non-local, interstate traffic that is not subject to reciprocal compensation under § 251(b)(5). On appeal, the D.C. Circuit held that the FCC "ha[d] not provided a satisfactory explanation" for its conclusion that its traditional jurisdictional analysis determines whether Internet-bound traffic is local traffic subject to § 251(b)(5). *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000). It therefore vacated and remanded the *ISP Declaratory Ruling*. The D.C. Circuit did not take issue with the FCC's end-to-end analysis of Internet-bound traffic, finding that there is "no dispute that the Commission has historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate." *Id.* at 5. Instead, the court found that the FCC had not sufficiently explained why that end-to-end analysis should also control whether Internet-bound traffic is local for purposes of the § 251(b)(5) reciprocal-compensation obligation. *See id.* at 3, 6, 9. Contrary to CoreTel's claim (Pet. 4-5), the D.C. Circuit did not hold that the FCC "lacked statutory authority" for its ruling; in fact, the court made clear that, with proper explanation, the FCC could again determine that neither the 1996 Act nor its regulations impose reciprocal-compensation obligations for Internet-bound traffic. *Bell Atlantic*, 206 F.3d at 9; *see also* Transcript of Oral Argument at 10, *WorldCom, Inc. v. FCC*, Nos. 01-1218, *et al.* (D.C. Cir. argued Feb. 12, 2002) ("Oral Arg. Tr.") (describing the *Bell Atlantic* court as "rigorously agnostic" on the question whether § 251(b)(5) requires payment of reciprocal compensation for Internet-bound traffic).

4. The FCC Proceedings on Remand. On remand from the D.C. Circuit's decision, the FCC reiterated, albeit on a different statutory theory, that an Internet-bound call is not subject to reciprocal compensation under § 251(b)(5). The FCC reasoned that Congress, in § 251(g), "carve[d] out" of § 251(b)(5) certain classes of telecommunications service — "'exchange access, information access, and exchange services for such access.'" *ISP Remand Order*[7] ¶ 34 (quoting 47 U.S.C. § 251(g)). The FCC noted that it had relied on § 251(g) in the *Local Competition Order* in holding that § 251(b)(5) does not apply to interstate access traffic, such as long-distance calls. *See id.* ¶ 36 & n.64 (citing *Local Competition Order*, 11 FCC Rcd at 16103, ¶ 1034).

The FCC further held that Internet-bound traffic is a form of "access" traffic — specifically, "information access" — that is subject to the "carve out" in § 251(g). *See id.* ¶ 44. That is so, the FCC explained, because Internet-bound traffic, like other types of access traffic, "travel[s] to points — both interstate and intrastate — beyond the local exchange." *Id.* ¶¶ 1, 37. Consequently, compensation for such traffic is governed not by § 251(b)(5) but rather by § 201, which authorizes the FCC to regulate compensation for interstate traffic. *See id.* ¶¶ 42, 44, 52.

Moreover, the FCC once again rejected CLECs' claims that Internet-bound traffic consists of two calls, one of which is a local call. *See id.* ¶ 44 & n.82. Instead, "when viewed on an end-to-end basis," Internet-bound calls "permit the dial-up Internet user to communicate directly with some distant site or party (other than the ISP) that the caller has specified." *Id.* ¶¶ 58-59; *see id.* ¶ 59 ("[t]he 'communication' taking place is between the dial-up customer and the global computer network of web content," not "with ISP modems").

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[7] Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

Therefore, an Internet-bound call is not, as CLECs had claimed, "simply a local call from a consumer to a machine," nor is it "really like a call to a local business — such as a pizza delivery firm . . . — that then uses the telephone to order wares to meet the [caller's] need." *Id.* ¶¶ 63, 64 (internal quotation marks omitted).

Finally, the FCC found, based on an extensive record, that state commission decisions requiring payment of reciprocal compensation for Internet-bound traffic had "distort[ed] the development of competitive markets" and had led to "classic regulatory arbitrage." *Id.* ¶¶ 21, 29. Because, as noted above, Internet-bound traffic is inherently one-way, decisions requiring the payment of reciprocal compensation had given CLECs an overwhelming economic incentive to sign up ISPs as customers, and a corresponding economic *dis*incentive to provide competing local telephone service to end-users. Whereas each ISP customer was an asset (because it allowed the CLEC to reap enormous revenue flows from originating carriers), each end-user customer was a liability (because the customer's Internet-bound calls would expose the CLEC to enormous revenue outflows). As the FCC noted, "convincing evidence in the record" showed that carriers have "targeted ISPs as customers merely to take advantage of these intercarrier payments" — offering free service to ISPs, paying ISPs to be their customers, and sometimes engaging in outright fraud. *Id.* ¶¶ 2, 70 & n.134, 86. The problem was pervasive: CLECs were receiving, on average, 18 times more traffic than they were originating, "resulting in annual CLEC reciprocal compensation billings of approximately two billion dollars, ninety percent of which is for ISP-bound traffic." *Id.* ¶ 5. The Commission concluded that this regime, which affirmatively discouraged CLECs from providing local voice service, was contrary to public policy and fundamentally incompatible with the pro-competitive goals of the 1996 Act. *See id.* ¶¶ 21, 70-71, 87 n.171.[8]

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[8] CoreTel never disputes — or even discusses — the FCC's findings in this regard. Indeed, in reproducing excerpts of the *ISP Remand Order* in

The Commission determined that "a bill and keep approach" — under which carriers "recover the costs of delivering traffic to ISP customers directly from those customers" — "is likely to be more economically efficient than recovering these costs from originating carriers," because it "is likely to send appropriate market signals and substantially eliminate existing opportunities for regulatory arbitrage." *Id.* ¶ 67. The Commission accordingly adopted a Notice of Proposed Rulemaking, in which it proposed to replace existing state-created schemes of reciprocal compensation with a "bill-and-keep" system.[9]

At the same time, though, the Commission recognized that "the record indicates a need for immediate action with respect to ISP-bound traffic." *Id.* ¶ 7. In response to CLECs' pleas that the Commission not immediately end the payment of reciprocal compensation for Internet-bound traffic, the FCC adopted, under § 201, a three-year interim compensation regime for such traffic, "to avoid a 'flash cut' to a new compensation regime." *Id.* ¶ 77. The FCC's "primary goal," however, remained "limit[ing], if not end[ing], the opportunity for regulatory arbitrage" created by the prevailing, state-commission established, reciprocal-compensation requirements. *Id.* Even most of the beneficiaries under the prior system (including petitioner's own trade association) praised the FCC for having struck a reasonable interim balance in this transitional regime.[10]

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the appendix to its petition, CoreTel conspicuously omits nearly all the FCC's findings on this issue.

[9] *See* Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 (2001) ("*Unified Intercarrier Compensation NPRM*").

[10] *See, e.g.*, CompTel Press Release, *CompTel Views FCC Reciprocal Compensation Decision as a Victory for Competition and Consumers* (Apr. 19, 2001) ("[t]he new reciprocal compensation rules announced today by the FCC achieve a reasonable compromise"), *at* http://www.comptel.org/press/apr19_2001.html; Statement of John Windhausen, Jr.,

5. The Court of Appeals Proceedings. On review, the D.C. Circuit rejected the FCC's theory that § 251(g) excludes Internet-bound traffic from the § 251(b)(5) reciprocal-compensation obligation, finding that § 251(g) "is not susceptible to the Commission's reading." Pet. App. 5a. For that reason alone, the court "remand[ed] the case to the Commission for further proceedings." *Id.* at 9a.

Having thus found that "§ 251(g) does not provide a basis for the Commission's action," the D.C. Circuit "ma[d]e no further determinations." *Id.* at 8a. Among the issues that the court expressly stated it was not resolving were "whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to § 251(b)(5)" and whether "the interim pricing limits imposed by the Commission are inadequately reasoned." *Id.* The court also made clear that it was *not* holding that the FCC was wholly without statutory authority to adopt its rules. On the contrary, the court explained that "[m]any of the petitioners themselves favor bill-and-keep, and there is plainly a non-trivial likelihood that the Commission has authority to elect such a system (perhaps under §§ 251(b)(5) and 252(d)[(2)](B)(i))." *Id.* at 8a-9a.

It was in this context that the court applied the test it had set forth most prominently in *Allied-Signal, Inc. v. United States Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993), to determine whether to vacate the FCC's rules or merely to remand. Under that long-established standard, the "decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Id.* at 150-51 (internal quotation marks omitted). Given its own conclusion that the FCC may well have authority to adopt its rules under other provisions, and the disruptive consequences of reinstating the anti-competitive arbitrage schemes that prevailed

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ALTS (Apr. 19, 2001), *at* http://www.alts.org/NewsPress/041901RecipComp.PDF.

prior to the FCC's action, the court expressly decided "not [to] vacate the order." Pet. App. 8a-9a.

CoreTel filed a petition for rehearing and rehearing *en banc*, as did two other CLECs and the state commissions. Each of the petitions challenged, on similar though not identical grounds, the D.C. Circuit's decision not to vacate the *ISP Remand Order*. The court requested a response from the FCC with respect to only one of the petitions (not CoreTel's); the ILEC Respondents also sought leave to file a response, which the court granted. Upon consideration of those responses, the court denied that petition. *See* Order, *WorldCom, Inc. v. FCC*, Nos. 01-1218, *et al.* (D.C. Cir. Sept. 25, 2002).[11] In separate orders, issued on September 24, 2002, the court denied the petitions for which it had not requested responses. *E.g.*, Pet. App. 10a-11a.

REASONS FOR DENYING THE PETITION

I. THE PETITION IS PREMISED ON A FUNDAMENTAL MISUNDERSTANDING OF THE COURT OF APPEALS' DECISION

CoreTel repeatedly claims that its petition presents the question whether the court of appeals, having held "that the FCC had no power to regulate intercarrier compensation for ISP-bound calls," "was obligated to vacate the *ISP Remand Order*." Pet. 9; *see, e.g.*, Pet. 8, 11, 12, 13-14, 15, 16, 17, 18. But the judgment below does not raise that question, because the D.C. Circuit did not hold what CoreTel claims it held.

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[11] The two other CLECs that jointly sought rehearing of the decision below, Focal Communications Corp. and Pac-West Telecomm, Inc., along with two additional CLECs (collectively, "CLEC respondents"), have filed a response in support of CoreTel's petition. As explained below, they also raise no certworthy issue. In any event, this Court need not consider their claims at all: they are not presented in the petition (indeed, they often contradict the claims in the petition), and they were not presented to the D.C. Circuit in the Focal/Pac-West petition for rehearing *en banc*, where those CLECs argued (as CoreTel does here) that the decision below reflected an improper application of *Allied-Signal*.

The court of appeals held only that the particular statutory provision on which the FCC relied — § 251(g) — did not provide a substantive basis for the regulations promulgated; the court did not suggest, let alone hold, that the Commission has no jurisdiction or authority to regulate intercarrier compensation for interstate access traffic, such as Internet-bound traffic. *See* Pet. App. 8a.

On the contrary, the court explicitly recognized that other statutory provisions are likely to provide the necessary substantive basis for the transitional rules adopted in the *ISP Remand Order*. *See id.* at 8a-9a (citing as examples 47 U.S.C. §§ 251(b)(5), 252(d)(2)(B)(i)).[12] Under long-settled principles of administrative law, however, the court of appeals could not rely on those statutory provisions, or any other provisions on which the Commission had not relied, to affirm the FCC's rules. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943).[13] Instead, it is for the Commission to evaluate those alternatives in the first instance on remand; once it does so, its interpretation will, of course, be entitled to *Chevron* deference. *See National Fed'n of Fed. Employees, Local 1309 v. Department of the Interior*, 526 U.S. 86, 100 (1999); *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 368 n.14 (1994).

Moreover, the fact is that it is the D.C. Circuit's practice to vacate a regulation when it concludes that the regulation is entirely outside the agency's statutory authority. Indeed, the court did just that shortly after it decided the present case, in a decision that CoreTel neglects to mention. *See Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 15 (D.C. Cir. 2002) (vacating because agency "has attempted to exert authority

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[12] Even the CLEC respondents recognize that the court below did no more than "reject[] the statutory basis for the *ISP Remand Order*" and that it also found that "some other statutory authority" could support the rules at issue. CLEC Resp. 3.

[13] The existence of such provisions, however, is relevant "with respect to the choice between vacatur and remand." *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537, 541 (D.C. Cir. 2002).

where it has none" and could "point to no statute authorizing its" rule). At most, therefore, CoreTel's petition amounts to a request for this Court to perform an error-correcting function by determining whether the D.C. Circuit erred when it concluded that this principle does not apply here. Cases asking this Court to correct the application of established legal principles ordinarily do not warrant plenary review.

Nor is there any merit to CoreTel's underlying substantive contention that the FCC acted "beyond the scope of power delegated to it" in issuing the *ISP Remand Order* and that it was not "entrusted to administer" the Act's reciprocal-compensation provisions. Pet. 15 (internal quotation marks omitted). As this Court has recognized, the FCC has the authority to determine the scope of the obligations created by the 1996 Act, and, to the extent those obligations apply, the "FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999); *see id.* at 380 ("§ 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies"). And, of course, it has long been settled that § 201(b) authorizes the FCC to regulate interstate access traffic, which the FCC has repeatedly found includes Internet-bound traffic. *See, e.g., Ambassador, Inc. v. United States*, 325 U.S. 317, 324 (1945); *see also ISP Remand Order* ¶ 55.[14]

For these reasons, this Court's decisions in *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Bowen v. Georgetown*

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[14] Before the D.C. Circuit, the CLEC Petitioners, including CoreTel and the CLEC respondents here, acknowledged that the FCC has statutory authority to issue regulations governing compensation for Internet-bound traffic. *See* Reply Brief of Carrier Petitioners and Supporting Intervenors at 19, *WorldCom, Inc. v. FCC*, Nos. 01-1218, *et al.* (D.C. Cir. filed Nov. 15, 2001). Here, the CLEC respondents claim that the FCC's authority is "not relevant to the issue presented in the CoreTel Petition," CLEC Resp. 3 n.1, but that view simply cannot be squared with the petition itself, which rests on the false premise that the D.C. Circuit held that the FCC lacks statutory authority to regulate intercarrier compensation for Internet-bound traffic.

University Hospital, 488 U.S. 204 (1988), on both of which CoreTel relies, have no bearing here. This case is not a "companion" to *Mead*, nor does it raise any question left open there. Pet. 8-9. As this Court and the court below have held, Congress unambiguously delegated rulemaking authority to the FCC with respect to the regulatory treatment of Internet-bound traffic; the agency's decision to address this question through a notice-and-comment proceeding raises no questions under *Mead*. *See* 533 U.S. at 229-31.[15] For the same reason, *Bowen*'s admonition that an agency's "power to promulgate legislative regulations is limited to the authority delegated by Congress" is not implicated here. 488 U.S. at 208; *see* 47 U.S.C. § 201(b).[16]

II. THE COURT OF APPEALS' APPLICATION OF ITS SETTLED PRECEDENT IS CORRECT AND DOES NOT MERIT REVIEW

Stripped of its primary misconception, CoreTel's petition presents only the question whether the D.C. Circuit properly applied its established test for determining whether to vacate an agency's rule. Petitioner's attack on the merits of that decision, which would require the Court to consider case-specific application of basic principles of administrative law,

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[15] CoreTel's lengthy argument that administrative agencies should not be accorded deference when they "act[] beyond the scope of power delegated . . . by Congress" is therefore entirely beside the point. Pet. 12-15.

[16] Nor are the CLEC respondents correct in characterizing *Allied-Signal* as an "overt effort to evade the implications of [*Bowen*]." CLEC Resp. 9. *Bowen* involved an agency's attempt to resurrect, and give retroactive effect to, a rule that a district court had vacated; it did not speak either to whether the district court chose the correct remedy (the agency did not appeal the district court's decision) or to what actions the agency could have taken if the district court had chosen to remand, but not vacate, the rule. Thus, as the D.C. Circuit has recognized, *Bowen* does not "yield an inference in favor of courts exercising their remedial discretion in favor of creating gaps [through vacatur] that as a result will be impossible to fill." *ICORE, Inc. v. FCC*, 985 F.2d 1075, 1082 (D.C. Cir. 1993) (emphasis omitted).

presents no certworthy issue. In any event, contrary to CoreTel's claims, the decision below did not establish a new test for vacatur, but instead was a run-of-the-mine application of that court's precedent.

1. Under settled precedent in the D.C. Circuit, an "inadequately supported rule . . . need not necessarily be vacated"; the "decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal*, 988 F.2d at 150-51 (quoting *International Union, United Mine Workers v. Federal Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)).[17]

CoreTel does not challenge any of this; indeed, it agrees that a court need not vacate a rule that it concludes must be remanded to the agency for further proceedings. *See* Pet. 14.[18] Instead, CoreTel argues that the decision below

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[17] The CLEC respondents, citing a footnote in a 1995 decision, suggest that *Allied-Signal* "is not even settled [law] within the D.C. Circuit." CLEC Resp. 5. More recent decisions make clear that even those few D.C. Circuit judges who disagree with *Allied-Signal* recognize that the court's decisions "provide precedent for the authority of the court to remand without vacating." *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 758 (D.C. Cir. 2002) (Sentelle, J., dissenting).

[18] The CLEC respondents, directly contradicting CoreTel and the position taken by two of their number before the D.C. Circuit, argue that *Allied-Signal* is contrary to the Administrative Procedure Act ("APA") and that a court may never remand without also vacating. CLEC Resp. 3-4, 5-7. But nothing in the APA provides the "unequivocal statement of [legislative] purpose" that this Court has held is necessary to find that Congress has curtailed the federal courts' traditional remedial discretion. *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). In any event, even Judge Randolph, the primary expositor of the position that the CLEC respondents advance here, agrees that a court, despite having vacated an agency action, may stay its mandate (thus preserving the effectiveness of the challenged rule) until proceedings on remand are complete. *Checkosky v. SEC*, 23 F.3d 452, 493 n.37 (D.C. Cir. 1994) (opinion of Randolph, J.) (describing "appl[ication] for a stay of the mandate" as "the usual and appropriate method" of addressing agency's claim "that vacating its order

expands on the rule in *Allied-Signal* and, "for the first time," does not vacate a "rule[] for which the agency had not supplied statutory support." Pet. 15-19. But CoreTel has simply overlooked or misread the D.C. Circuit's precedents. On numerous occasions, that court has declined to vacate agency orders in cases where, as here, the court found insufficient the particular source of statutory authority identified in the agency's order, while leaving open the question whether other statutory provisions could provide the requisite authority. For example, in *Davis County Solid Waste Management v. EPA*, the D.C. Circuit on rehearing refused to vacate part of a set of rules, despite initially concluding that "they exceed the EPA's statutory authority," after finding that this part of the rules likely could be reinstated on remand consistent with the governing statute and that the consequences of vacating that part would be particularly disruptive. 101 F.3d 1395, 1411 (D.C. Cir. 1996), *modified on reh'g*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (per curiam).[19]

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or rule would cause difficulties"). Like CoreTel, the CLEC respondents neither mention nor challenge the validity of this widely accepted practice. *See infra* pp. 18-19.

[19] Nor is *Davis County* the only such case where the D.C. Circuit has remanded but not vacated based on its conclusion that statutory provisions other than the one on which the agency relied could support the agency's rule. *See American Corn Growers Ass'n v. EPA*, 291 F.3d 1, 14-15 (D.C. Cir. 2002) (per curiam) (declining to vacate rule despite finding that it "appear[ed] to extend [an] express statutory deadline," "which is beyond the agency's authority"); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1047-48 (D.C. Cir.) (declining to vacate rule despite finding that agency, among other things, "failed to comply with § 202(h)," which sets limits on the agency's authority to retain certain rules), *modified on other grounds on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); *USTA v. FBI*, 276 F.3d 620, 626-27 (D.C. Cir. 2002) (declining to vacate rule despite rejecting agency's interpretation of its statutory authority, because "it is not so clear . . . that there are no defensible grounds for its conclusions"); *National Mining Ass'n v. EPA*, No. 95-1006, 1996 WL 10101 (D.C. Cir. Jan. 16, 1996) (following decision rejecting agency's interpretation of its authority under § 112 of the Clean Air Act, court denied motion to enforce mandate and compel agency to vacate rule, because "opinion and judgment did not vacate EPA's rule"); *International Union,*

2. Equally mistaken is CoreTel's claim that the D.C. Circuit, by resting its decision not to vacate the *ISP Remand Order*, in part, on the ground that "there is plainly a non-trivial likelihood that the Commission has authority" to adopt the regulations at issue under other provisions of the Communications Act (Pet. App. 8a-9a), "create[d] for the first time a new standard of review of agency jurisdiction." Pet. 18. There is nothing novel about the court's decision. The D.C. Circuit has recognized that the factors it considers in deciding whether to vacate an agency action "interrelate on a sliding scale and must be balanced against each other." *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998); *see also International Union*, 920 F.2d at 966-67 (analogizing *Allied-Signal* factors to those considered in deciding whether to grant preliminary injunction). In *Allied-Signal* itself, the D.C. Circuit "refrain[ed] from vacating [a] rule" despite "giv[ing] little weight to the possibility that the Commission could pull a reasonable explanation out of the hat." 988 F.2d at 152-53. Instead, in exercising its remedial discretion with respect to that rule, the court stressed the fact that vacatur "would give licensees a peculiar windfall." *Id.*

In any event, CoreTel takes too literally the court's understated reference to a "non-trivial likelihood." The court found it "plain[]" that alternative statutory provisions might support the FCC rules, Pet. App. 8a, specifically mentioning one such alternative in the opinion (47 U.S.C. §§ 251(b)(5) and 252(d)(2)(B)(i)), *see* Pet. App. 8a-9a, and another one at oral argument (47 U.S.C. §§ 201, 251(i)), *see* Oral Arg. Tr. at 37. Nor are these the only possibilities. To take another example, § 251(b)(5) on its face imposes an obligation on

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United Auto. Workers v. OSHA, 938 F.2d 1310, 1317-18, 1325-26 (D.C. Cir. 1991) (requesting briefing on whether to vacate agency's rule in view of finding that agency's claimed statutory authority "raise[d] a serious nondelegation issue"), *order on supplemental briefing*, No. 89-1559, 1991 WL 223770 (D.C. Cir. Sept. 16, 1991) (ruling that supplemental briefing had not "persuaded [the court] that it would be appropriate to vacate all or part of the rule").

"local exchange carriers" to establish "reciprocal" compensation obligations for the exchange of traffic. The Commission might conclude that it makes no sense to extend that obligation to an entire class of traffic that by its nature is one-way and therefore non-reciprocal, a conclusion that would be reinforced by the accompanying pricing standard in § 252(d)(2)(A), which provides for the "mutual and reciprocal" recovery of the costs associated with the exchange of traffic. Likewise, § 251(b)(5), and its accompanying pricing standard, expressly imposes such an obligation only on traffic that originates on the network of one carrier and terminates on the network of another. But the FCC repeatedly has held that Internet-bound traffic does not terminate on the network of a carrier serving an ISP, but continues on over the Internet to destinations around the globe. And, of course, even when it does apply, § 251(b)(5) itself contemplates the use of bill-and-keep arrangements.

In addition, there can be no doubt that the second prong of the *Allied-Signal* test — whether vacatur would have "disruptive consequences" — is satisfied here. As explained above, CoreTel nowhere challenges the Commission's conclusion, solidly based on an extensive record, that payment of reciprocal compensation for Internet-bound traffic led to "classic regulatory arbitrage," "undermine[d] the operation of competitive markets," was contrary to public policy, and was fundamentally incompatible with the pro-competitive goals of the 1996 Act. *ISP Remand Order* ¶¶ 21, 29, 70-71, 87 n.171.[20] This evidence left the FCC with no doubt of the need for "*immediate action* with respect to ISP-bound traffic" and led it to adopt the interim compensation regime that

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[20] Accordingly, CoreTel's blithe assertion that the D.C. Circuit's finding of disruptive consequences was "without record support" is at war with reality. Pet. 19 n.5. CoreTel simply ignores the FCC's conclusion that continued payment of reciprocal compensation for Internet-bound traffic would further delay the "viable, long-term competition among efficient providers of local exchange and exchange access services" that Congress sought to promote in the 1996 Act. *ISP Remand Order* ¶ 71.

CoreTel seeks to have vacated. *Id.* ¶ 7 (emphasis added). Vacatur would allow CLECs to continue to "target[] ISPs as customers" in order "to reap an intercarrier compensation windfall." *Id.* ¶¶ 2, 86. This is particularly true with respect to CoreTel. Its filings before the D.C. Circuit revealed that it targets ISP customers exclusively, leading the FCC to deem it "the poster boy of reciprocal compensation gamesmanship." Response of FCC to CoreTel Emergency Motion for Stay at 14, *WorldCom, Inc. v. FCC*, Nos. 01-1218, *et al.* (D.C. Cir. filed June 12, 2001).

3. CoreTel's accusation that the D.C. Circuit has recently "collapse[d] ... into ... *ad hoc*, results-oriented appellate review" of FCC actions is baseless. Pet. 21. Neither of the decisions that CoreTel claims evidence "a similarly careless approach" (*id.*) to the question of vacatur provides any support for its charge; instead, both demonstrate the same careful consideration of that question found in the opinion below.

In *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), the D.C. Circuit held that the FCC's definition of a term in a rule that it promulgated was arbitrary and capricious — precisely the situation where CoreTel agrees that *Allied-Signal* sets forth the appropriate test for vacatur (Pet. 18-19) — but the panel divided over the appropriate remedy. *See* 284 F.3d at 169. Although the majority decided to remand the case for further consideration, Judge Sentelle dissented from that decision on the narrow ground that, in his view, § 202(h) of the 1996 Act — a provision that requires the FCC to revisit its broadcast media ownership rules and that is not applicable to the regulations at issue here — establishes a special rule requiring vacatur of any broadcast media ownership regulation that the agency cannot justify. *See id.* at 171-72 (Sentelle, J., dissenting).

In *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, No. 02-858 (U.S. Mar. 24, 2003), the D.C. Circuit, applying this Court's decision in *Iowa Utilities Board*, vacated the two orders in which the FCC established unbundled network elements under 47 U.S.C. § 252(d). The FCC adopted those two orders on remand from this Court's

vacatur of the initial order establishing such elements. *See id.* at 428, 429. There, as here, CLECs dissatisfied with the court's choice of remedy, as well as the FCC, sought rehearing. In response to those petitions, the court, in a decision that CoreTel does not mention, granted a partial stay of its mandate as to both FCC orders until January 2, 2003, to allow the FCC to issue its decision on remand. *See* Order, *USTA v. FCC*, Nos. 00-1012, *et al.* (D.C. Cir. Sept. 4, 2002).[21] The D.C. Circuit has recognized that vacatur followed by a stay of the mandate is functionally identical to remand without vacatur. *See Maryland People's Counsel v. FERC*, 768 F.2d 450, 455 (D.C. Cir. 1985) (per curiam).

CoreTel never disputes that the court below could have followed that same procedure here, and it thus effectively concedes that the D.C. Circuit had authority to leave in place the FCC's transitional rules while the Commission conducted its proceedings on remand. Furthermore, issuing such a stay would have been consistent with that court's precedent, in light of the significant market distortions and impediments to the development of local competition that the FCC found are the result of requiring payment of reciprocal compensation for Internet-bound traffic. *See Independent U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 855 (D.C. Cir. 1987) (mandate stayed "to avoid further disruptions in the domestic market and to allow the Secretary to undertake further proceedings"); *Maryland People's Counsel*, 768 F.2d at 455 (same).

Finally, the rulemaking that the FCC initiated concurrently with its release of the *ISP Remand Order* — in which the agency proposed to adopt a final rule governing intercarrier

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[21] The D.C. Circuit subsequently extended the stay of its mandate to February 20, 2003, at the request of the FCC and with the consent of all parties. *See* Order, *USTA v. FCC*, Nos. 00-1012, *et al.* (D.C. Cir. Dec. 23, 2002); Order, *USTA v. FCC*, Nos. 00-1015, *et al.* (D.C. Cir. Dec. 23, 2002).

compensation for Internet-bound traffic[22] — could result in the issuance of rules superseding those at issue here before this Court could decide this case on the merits. Once the FCC completes that proceeding, this case will be effectively moot, providing yet another reason why this case would be a poor vehicle for review.

III. THERE IS NO CIRCUIT CONFLICT HERE

Petitioner's claim of a circuit conflict (Pet. 19-20) is insubstantial. Indeed, in the case on which petitioner primarily relies, *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995), that court, like the court below, remanded an agency action for further proceedings without vacating that action (and, moreover, reversed a district court order vacating that action). *See id.* at 1405-06. The Ninth Circuit relied there on the same factors set forth in *Allied-Signal* — namely, "the seriousness of the order's deficiencies" and "the disruptive consequences" of vacatur. 988 F.2d at 150-51 (internal quotation marks omitted); *see Idaho Farm*, 58 F.3d at 1405-06 (agency "can remedy [its] error" on remand, and vacatur has "the potential [for] extinction of an animal species").[23]

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[22] *See Unified Intercarrier Compensation NPRM*, 16 FCC Rcd at 9611-13, 9633, ¶¶ 1, 3-4, 66; *see also ISP Remand Order* ¶¶ 2, 6, 83.

[23] Nor does the decision below conflict with *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1998), on which petitioner also relies (Pet. 19). In that case, the court vacated a rule promulgated by the Attorney General of the United States that purported to authorize *ex parte* contacts with certain employees of a represented party, where such contacts were otherwise barred by applicable rules of the Missouri Supreme Court. *See* 132 F.3d at 1253-54. The court vacated the rule only after finding that it "cannot reasonably conclude that the grants of authority in the statutory provisions cited by the government contemplate the issuance of anything resembling" the rule at issue. *Id.* at 1257. As explained above, the D.C. Circuit in the decision below reached the opposite conclusion with respect to the rules that the FCC adopted in the *ISP Remand Order*.

At least three other circuits have also adopted the *Allied-Signal* test; neither CoreTel nor the CLEC respondents identify any circuit that has rejected it. *See National Org. of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, 260 F.3d 1365, 1380 (Fed. Cir. 2001) (remanding, but not vacating, rule where "[i]t may be that the agency can provide a reasonable explanation" for its statutory interpretation on remand and vacatur would have "'disruptive consequences'"); *Central Maine Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001) (holding that whether to remand, but not vacate, agency action "rests in the sound discretion of the reviewing court," and remanding, but not vacating, where "a preliminary assessment suggests that the errors at issue can probably be mended" and where FERC maintained that the rule "is needed now to assure adequate energy supplies in New England"); *Central & South West Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (remanding, but not vacating, rule where "EPA may well be able to justify its decision [on remand] . . . and it would be disruptive to vacate [the] rule"), *cert. denied*, 532 U.S. 1065 (2001).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM P. BARR
MICHAEL E. GLOVER
EDWARD H. SHAKIN
JOHN M. GOODMAN
VERIZON
1515 North Courthouse Road
Suite 500
Arlington, Virginia 22201
(703) 351-3860
Counsel for the Verizon telephone companies

JAMES G. HARRALSON
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Suite 1800
Atlanta, Georgia 30309
(404) 249-2641
Counsel for BellSouth Corp.

LAWRENCE E. SARJEANT
INDRA SEHDEV CHALK
MICHAEL T. MCMENAMIN
ROBIN E. TUTTLE
1401 H Street, N.W., Suite 600
Washington, D.C. 20005
(202) 326-7371
Counsel for United States Telecom Association

MARK L. EVANS
Counsel of Record
MICHAEL K. KELLOGG
SEAN A. LEV
AARON M. PANNER
SCOTT H. ANGSTREICH
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for BellSouth Corp., SBC Communications Inc., the Verizon telephone companies, and United States Telecom Association

JAMES D. ELLIS
PAUL K. MANCINI
SBC COMMUNICATIONS INC.
175 East Houston
San Antonio, Texas 78205
(210) 351-3448

GARY L. PHILLIPS
SBC COMMUNICATIONS INC.
1401 I Street, N.W., Suite 400
Washington, D.C. 20005
(202) 326-8910
Counsel for SBC Communications Inc.

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